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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 281

LOCAL 776, I.A.T.S.E. (FILM EDITORS), PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 5–18) is not yet reported. The Board's decision and order (R. 10–14) [1] are reported at 124 N.L.R.B. 842.

JURISDICTION

The judgment of the court of appeals (Pet. App. 5–18) was entered on May 10, 1962, and a decree was entered on July 2, 1962 (Pet. App. 19–21). The petition for a writ of certiorari was filed on July 27, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "R." refers to the printed record filed with the court below.

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that the Union caused the discharge of an employee because he was not a Union member, in violation of Section 8(b)(2) of the National Labor Relations Act.

STATUTES INVOLVED

The relevant statutory provisions are set forth in the Petition (Pet. App. 1–4).

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

In May 1956, the Company [2] and petitioner Union [3] executed a collective bargaining agreement effective to January 30, 1960, which required employees working in "union" classifications to join the Union 30 days after being hired (R. 16; 192, 194, 196). In September 1957, Henry Carlson obtained work in the Company's editorial department "breaking down" filmed television commercials (R. 19; 47–48). Sometime in May 1958, an employee informed Bernard Loftus, the Company's head film editor, that Carlson was not a member of the Union (R. 25; 105–106).[4] Loftus so notified the Union's assistant business representative, William B. Todd; Loftus also inquired of Todd whether Carlson's job was under the Union's jurisdic-

[2] Cascade Pictures of California, Inc., a producer of commercial television films (R. 14–15).

[3] Local 776 (Motion Picture Film Editors), International Alliance of Theatrical Stage Employes and Moving Picture Machine Operators of the United States and Canada.

[4] Carlson had inquired about Union membership both before (R. 18, 23; 51, 82–83) and immediately after being hired by the

tion (R. 25; 106). Thereafter, Loftus told Carlson that he was "very sorry," that he "had the Union on his back" and that he was "forced to let [Carlson] go by the end of the week" (R. 19–20; 10, n. 3; 53–55).

Carlson reported this conversation to Lester Selson, his supervisor (R. 20; 55). Selson, in Carlson's presence, called Todd at the Union office, told Todd that Carlson was a valuable man, and asked him whether an arrangement could be worked out with the Union to permit Carlson to stay on (R. 20; 56–57). Todd told Selson that he would come over to the film department to investigate the matter (R. 20; 57).

Two or three days later, Carlson noticed Todd and Selson in Selson's office, and joined them. Selson told Todd that he had "some question" whether Carlson's job—"breaking down" film—came under the Union's jurisdiction; that Carlson's ability to speak several foreign languages made him "especially useful" to the Company in its dealings with foreign concerns; and that, if Carlson were to be laid off, the Company would have to train someone else "from scratch" (R. 20–21; 62). Todd replied that the Union had jurisdiction over Carlson's job because he handled film, and that the Company should blame itself for any inconvenience in training another man for Carlson's job because "the Union had members out of work" and

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Company. On the latter occasion he was informed at the Union's office that the Union did not strictly enforce the 30-day period and would call him when it came time to process him into membership. Two or three weeks later the Company laid him off for lack of work, and he was not called back to work until April 1958 (R. 19; 81, 51, 72, 53).

Carlson should not have been hired "in the first place." Todd added that he did not have the "final say so" in the matter, that he would "check with his superiors," and that he would let Carlson know about their decision (R. 21; 62).

Several days later, Todd told Carlson at the Union's office that "his superiors" had concluded that the Company had broken its contract with the Union, that the Union could "fine" the Company for a sum equal to Carlson's earnings in its employ, but that, because of "unusual conditions," it had been decided that it would be "better to discontinue [Carlson's] employment at Cascade" (R. 22; 63–65). Todd then remarked that, while the Union was under no "legal obligation to do anything for [Carlson]," he felt "a moral obligation * * * to make up for the job [Carlson] had lost" and therefore that he would get Carlson "a summer job at ABC" (R. 22; 65).

Meanwhile, Todd advised Loftus that Carlson's work fell under the Union's jurisdiction (R. 25; 164). The Company then hired Peter de Turczynowicz, a Union member referred by the Union's office (R. 23; 65–66, 183). On May 23, after de Turczynowicz had become familiar with Carlson's duties, Loftus discharged Carlson, effective May 30, 1958 (R. 23; 66). According to Loftus, Carlson's lack of Union membership was "the only reason" for his discharge (R. 25; 115).

B. THE BOARD'S CONCLUSIONS AND ORDER

Upon the foregoing facts, the Board concluded that the Union violated Section 8(b)(2) and 8(b)(1)(A)

of the Act, 49 Stat. 452, as amended, 61 Stat. 140, 29 U.S.C. 158(b)(2) and 158(b)(1)(A), by causing the Company to discharge Carlson because he was not a Union member (R. 3[illegible]).[5] The Board's order required the Union to cease and desist from the unfair labor practice found. It also directed the Union to notify the Company and Carlson that it had no objection to Carlson's employment despite his lack of Union membership, to request the Company to reinstate Carlson to his former position, to make Carlson whole for wages lost as a result of the discrimination against him, and to post appropriate notices (R. 10–12).

C. THE DECISION OF THE COURT OF APPEALS

The court below upheld the Board's unfair labor practice finding as supported by substantial evidence, and, with a modification not here relevant, enforced the Board's order (Pet. App. 15, 18).

ARGUMENT

Although there was a union-security provision in the contract between the Company and the Union requiring employees to become Union members after 30 days of employment (see p. 2, *supra*),[6] that provision is not material to this case, for the Union did not invoke it in effecting Carlson's discharge or in defending against the Board's complaint (R. 10, n. 3; Pet. App. 10–11, n. 6); nor does the Union rely on that provision in its petition. The only question

[5] No charge was filed against the Company, and the Board made no unfair labor practice findings against it.

[6] A proviso to Section 8(a)(3) of the Act, 49 Stat. 452, as amended, 29 U.S.C. 158(a)(3), permits such agreements.

presented is whether substantial evidence supports the Board's finding, sustained by the court below, that the Union caused the Company to discharge employee Carlson because he was not a member of the Union.[7] Petitioner contends that the finding is not so supported because (i) a crucial element of the Board's case—*viz.*, that Carlson's lack of Union membership was the motive for the Union's action in procuring his discharge—rests solely upon evidence that is hearsay as to the Union,[8] and (ii) Section 10(b) of the Act bans the use of such hearsay evidence.[9]

[7] Section 8(b)(2) of the Act makes it an unfair labor practice for a union "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3)." Section 8(a)(3), in turn, makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment * * * to encourage or discourage membership in any labor organization." The employer need not be a party to the proceeding to permit a finding that the union has violated Section 8(b)(2), for that section "requires only a showing that the union caused or attempted to cause the employer to engage in conduct which, if committed, would violate § 8(a)(3)." *Radio Officers' Union v. National Labor Relations Board*, 347 U.S. 17, 52–54.

[8] This consists of Carlson's testimony that, about a week before his discharge, Film Editor Loftus said that he would have to let Carlson go because "he had the Union on his back," and that Supervisor Selson, in Carlson's presence, phoned Union official Todd and asked whether the Union could work out some arrangement whereby Carlson could be retained (see pp. 3, 4–5, *supra*).

[9] Section 10(b), 49 Stat. 453, as amended, 29 U.S.C. 160(b), provides in relevant part that: "Any such [unfair labor practice] proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934. * * *"

This issue does not warrant review by this Court, for, as we shall show below, there is sufficient evidence apart from the hearsay evidence to support the Board's unfair labor practice finding; and, in any event, the receipt and use of the latter evidence in the circumstances of this case was entirely proper and did not contravene Section 10(b).

1. Indisputably competent evidence summarized in the Statement (pp. 2–5, *supra*) clearly demonstrates the Union's part in effecting Carlson's discharge. It shows that, when the Company's head film editor, Loftus, learned that Carlson was not a Union member, he promptly asked the Union to advise him whether Carlson's particular job was under the Union's jurisdiction. The Union thereupon sent its business representative, Todd, to review the work being done by Carlson. Todd stated his opinion that the Union had jurisdiction over Carlson's job, and that the Company had itself to blame for any "inconvenience" suffered by Carlson's discharge because it should not have hired him "in the first place" while "the Union had members out of work." Following this conversation, Todd notified Loftus that Carlson's work did come under the Union's jurisdiction, and supplied a Union man, de Turczynowicz, to replace Carlson. A few days later, when de Turczynowicz had become familiar with Carlson's duties, Loftus discharged Carlson. Todd, meanwhile, promised Carlson "a summer job at ABC" because he felt "a moral obligation * * * to make up for the job [Carlson] had lost" with the Company. The possibility that the Company might have had any other reason for discharging Carlson was negated by

the evidence that Selson, Carlson's immediate superior, told Todd that Carlson's knowledge of several languages made him "especially useful" to the Company in dealing with foreign customers and that the Company would have to train another man "from scratch" if it let Carlson go. Upon this evidence alone, and without regard to the evidence hereafter discussed, we submit that the Board could properly find, as it did, that the Union had caused Carlson to be discharged for the reason that he was not a Union member.

2. In any event, the Board's use of Carlson's testimony concerning his conversations with Loftus and Selson (see note 8, *supra*) was not contrary to the requirement in Section 10(b) of the Act (see note 9, *supra*), that the Board shall "so far as practicable" adhere to the rules of evidence applicable in the federal district courts. Although petitioner does not deny that Carlson's testimony that Company representatives stated that they discharged him because of the Union would be admissible as evidence of motive in a proceeding brought against the Company,[10] it contends that it is objectionable hearsay evidence when relied on for any purpose in a proceeding against the Union (Pet. 17, 26–27). Contrary to petitioner's assumption, the requirement in Section 10(b) does not completely rule out the use of hearsay evidence, particularly where, as here, it is corrobo-

[10] See *National Labor Relations Board* v. *Thomas Drayage & Rigging Co.*, 206 F. 2d 857, 860 (C.A. 9); *National Labor Relations Board* v. *Dant*, 207 F. 2d 165, 167 (C.A. 9); *National Labor Relations Board* v. *Philadelphia Iron Works*, 211 F. 2d 937, 942–943 (C.A. 3).

rated by other evidence."[11] Moreover, the court below properly concluded (Pet. App. 14) that, since Carlson's testimony was utilized by the Board, not to prove that the Union had caused him to be discharged, but for the "limited purpose of establishing the Company's motive and reason for discharging Carlson" (R. 9, n. 2, 31–32)—a relevant issue, as the court below held (Pet. App. 13)—it was admissible under the rules of evidence applicable in the courts. It is well settled that a third party's statements of his reasons for taking certain action, though hearsay, are properly admissible to prove the state of mind of the declarant if that be in issue in a proceeding involving another party. See *Lawlor* v. *Loewe*, 235 U.S. 522, 536; *Garford Trucking Corp.* v. *Mann*, 163 F. 2d 71, 73 (C.A. 1), certiorari denied, 332 U.S. 810; *Greater New York Live Poultry C. of C.* v. *United States*, 47 F. 2d 156, 159 (C.A. 2); *American Cooperative Serum Ass'n* v. *Anchor Serum Co.*, 153 F. 2d 907, 912 (C.A. 7); *National Labor Relations Board* v. *Wallick*, 198 F. 2d 477, 483 (C.A. 3); 6 Wigmore, *Evidence* §§ 1714, 1729, 1789, 1790 (3d ed. 1940). Cf. *Buckeye Powder Co.* v. *DuPont Powder Co.*, 248 U.S. 55, 65.[12]

3. None of the cases relied on by petitioner is in-

[11] See *National Labor Relations Board* v. *Imparato Stevedoring Corp.*, 250 F. 2d 297, 302–303 (C.A. 3).

[12] It should also be noted that petitioner was afforded an opportunity to test the reliability of Carlson's testimony by cross-examining Loftus and Selson, who were witnesses in the Board proceeding. And, Loftus, who was subjected to a rigorous direct and cross-examination, conceded that Carlson's lack of Union membership was "the only reason" for his discharge (p. 4, *supra*).

consistent with the foregoing. In *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U.S. 197, 229–230 (Pet. 18–20), this Court condemned reliance upon "mere uncorroborated hearsay or rumor"; as we have shown, the hearsay here was corroborated by other evidence (see pp. 4, 7–8, *supra*); and, indeed, it was admissible independently under a recognized exception to the hearsay rule (see p. 9, *supra*). Similarly distinguishable are the three Ninth Circuit cases cited by petitioner (Pet. 21–23) in which evidence was found to be hearsay and insufficient to support the Board's findings; in those cases, unlike here, the hearsay evidence was uncorroborated by other evidence and was, moreover, relied on to establish more than just motive.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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